

FILE COPY

14

In
The Supreme Court
of the United States

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS and LENA BERNARDS,
his wife,

Petitioners.

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), and JOSEPH M.
LOOMIS, Trustee,

Respondents.

Upon Writ of Certiorari to the United States Circuit Court of
Appeals for the Ninth Circuit.

**BRIEF OF RESPONDENTS M. R. JOHNSON AND
JOSEPH M. LOOMIS, TRUSTEE.**

H. G. PLATT,
GEORGE BLACK JR. and
A. D. PLATT,
Portland, Oregon,
Counsel for respondent
M. R. JOHNSON.

RALPH A. COAN,
Portland, Oregon,
Counsel for respondent
JOSEPH M. LOOMIS, Trustee.

INDEX

| | Page |
|---|------|
| Statement of Facts | 1 |
| I. The Circuit Court of Appeals was without jurisdiction to recall its mandate or to revoke or modify its decree, for the reason that prior to the filing of the application therefor the term at which the decree was entered had expired and the mandate had issued | 12 |
| II. This is not a case where petitioners' motion in the Circuit Court of Appeals should be taken as an application for leave to file a bill of review or petition for rehearing in the District Court | 22 |
| (1) The subsequent decision of a higher court neither demonstrates an error of law apparent upon the face of a decree nor constitutes such new matter as will sustain a bill of review to vacate it | 22 |
| (2) This was not a case for rehearing in the District Court under the doctrine of <i>John Simmons Co. vs. Grier Bros. Co.</i> , supra | 25 |
| III. The denial of petitioners' motion by the Circuit Court of Appeals was proper because there was no error in that court's judgment on the merits | 27 |
| (1) The matters involved in the orders of the District Court from which appeal was taken to the Circuit Court of Appeals had all been previously determined by the District Court, and the time for appeal from such determinations had long since expired | 27 |

INDEX—Continued

Page

| | |
|--|----|
| (2) The foreclosure sales of the real estate were valid and the bankrupts had lost title thereto before they invoked the benefits of the amended Frazier-Lemke Act | 31 |
| (3) The acts of the referee in appointing a trustee and liquidating the nonexempt personal estate were not erroneous | 44 |
| IV. The recent decisions of this court | 46 |
| (1) John Hancock Mutual Life Insurance Co. vs. Bartels, —U. S.—, 84 L. Ed. Advance Sheets 154 | 46 |
| (2) Kalb vs. Feuerstein, —U. S.—, 84 L. Ed. Advance Sheets 281 | 48 |
| (3) Union Joint Stock Land Bank vs. Byerly, —U. S.—, 84 L. Ed. Advance Sheets 689.. | 49 |
| (4) Borchard vs. California Bank, —U. S.—, 84 L. Ed. Advance Sheets 867 | 51 |
| Conclusion | 52 |

TABLE OF CASES

| | Pages |
|---|-------|
| 95 A. L. R. page 708..... | 22 |
| Bank of Eureka vs. Partington, 91 Fed. (2d) 587, 590 (9th Circuit) | 44 |
| Borchard vs. California Bank, —U. S.—, 84 L. Ed. Advance Sheets 867 | 51 |
| Casey vs. Sterling Cider Co., 15 Fed. (2d) 52 (1st Circuit) | 20 |
| Clarke vs. Hot Springs Electric Light & Power Co., 76 Fed. (2d) 918 (10th Circuit) | 26 |
| Conboy, Trustee in Bankruptcy vs. First National Bank of Jersey City, 203 U. S. 141, 51 L. Ed. 128 | 26 |
| Davis vs. Friedlander, 104 U. S. 570, 26 L. Ed. 818..... | 35 |
| Dixie Meadows Co. vs. Kight, 150 Ore. 395, 405..... | 37 |
| Eyster vs. Gaff, 91 U. S. 521, 23 L. Ed. 403..... | 35 |
| Fairmont Creamery Co. vs. Minnesota, 275 U. S. 70, 72 L. Ed. 168..... | 14 |
| First Trust & Savings Bank vs. Iowa-Wisconsin Bridge Co., 98 Fed. (2d) 416, 428..... | 26 |
| Foster Brothers Manufacturing Co. vs. National Labor Relations Board, 90 Fed. (2d) 948 (4th Circuit).... | 16 |
| In re Gerdes, 102 Fed. 318 (So. Dist. Ohio)..... | 35 |
| In re Gillette Realty Co., 15 Fed. (2d) 193 (9th Circuit) | 35 |
| In re Glory Bottling Co. of New York, Inc., 283 Fed. 110 | 21 |
| Grande vs. Arizona Wax Paper Co., 90 Fed. (2d) 801 (9th Circuit) | 30 |

TABLE OF CASES—Continued

Pages

| | |
|---|-------------------|
| John Hancock Mutual Life Insurance Company vs. Bartels, —U. S.—, 84 L. Ed. Advance Sheets 154 | 2, 13, 23, 46, 48 |
| Hart vs. Wiltsee, 25 Fed. (2d) 863 (1st Circuit) | 17 |
| Hawkins vs. Cleveland, C., C. & St. L. Ry. Co., 99 Fed. 322 (7th Circuit) | 20 |
| Heffron vs. Western Loan & Building Co., 84 Fed. (2d) 301, 305 (9th Circuit)..... | 44 |
| Heidelberg vs. Slader, 1 Handy 456..... | 50 |
| Kalb vs. Feuerstein, —U. S.—, 84 L. Ed. Advance Sheets 281 | 36, 38, 48 |
| Marcy vs. Miller, 95 Fed. (2d) 611, 612 (10th Circuit) | 30 |
| In re McIntosh, 95 Fed. (2d) 627 (9th Circuit)..... | 26 |
| McWilliams vs. Blackard, 96 Fed. (2d) 43, 45 (8th Circuit) | 30 |
| Mintz vs. Lester, 95 Fed. (2d) 590, 591 (10th Circuit) | 30 |
| Miocene Ditch Co. vs. Champion, 197 Fed. 497 (9th Circuit) | 19 |
| National Brake & Electric Co. vs. Christensen, 254 U. S. 425, 65 L. Ed. 341..... | 24 |
| Oregon Code 1930 section 3-510..... | 37 |
| Oregon Code 1930 section 6-302..... | 37 |
| Oregon Code 1930 section 6-504..... | 36 |
| Oregon Code 1930 section 6-507..... | 36 |

TABLE OF CASES—Continued

| | Pages |
|--|--------|
| Patents Process vs. Durst, 69 Fed. (2d) 283 (9th Cir- cuit) | 29 |
| Pearce vs. Coller, 92 Fed. (2d) 237..... | 41 |
| Remington on Bankruptcy (4th Ed.) section 502..... | 21 |
| In the matter of Republic Pipe & Iron Corp., 73 Fed. (2d) 1010 (2nd Circuit)..... | 26 |
| Reynolds vs. Manhattan Trust Co., 109 Fed. 97 (8th Circuit) | 17 |
| Roberts Auto & Radio Supply Co. vs. Dattle, 44 Fed. (2d) 159 (3rd Circuit)..... | 30 |
| Roemer vs. Neumann, 132 U. S. 103, 33 L. Ed. 277..... | 26 |
| In re Rohrer, 177 Fed. 381 (6th Circuit)..... | 35 |
| Roseburg Nat. Bank vs. Camp, 89 Ore. 67, 71..... | 37 |
| Sandusky vs. Nat. Bank, 23 Wall. 289, 23 L. Ed. 155.. | 21 |
| Schell vs. Dodge, 107 U. S. 629, 27 L. Ed. 601..... | 14, 19 |
| Schram vs. Poole, 97 Fed. (2d) 566 (9th Circuit)..... | 26 |
| Scotten vs. Littlefield, 235 U. S. 407, 59 L. Ed. 289..... | 23 |
| John Simmons Co. vs. Grier Bros. Co., 258 U. S. 82, 66 L. Ed. 475..... | 23, 25 |
| Staude Mfg. Co. vs. Labombarde, 247 Fed. 879 (1st Circuit) | 19 |
| Straton vs. New, 283 U. S. 332, 75 L. Ed. 1060..... | 35 |
| Sundh Electric Co. vs. Cutler-Hammer Mfg. Co., 244 Fed. 163 (2nd Circuit) | 20 |
| Tilghman vs. Werk, 39 Fed. 680, 682..... | 23 |

TABLE OF CASES—Continued

Pages

| | |
|---|-----------------------|
| Union Joint Stock Land Bank vs. Byerly, —U. S. —, 84 L. Ed. Advance Sheets 689..... | 34, 38, 40, 42, 45 49 |
| United States vs. American Railway Express Co., 265 U. S. 425, 435, 68 L. Ed. 1087, 1093..... | 48 |
| United States vs. Dowell, 82 Fed. (2d) 3 (8th Circuit) | 26 |
| Title 11 U. S. C. A., section 1..... | 20, 21 |
| Utah Power & Light Co. vs. United States, 242 Fed. 924 (8th Circuit) | 19 |
| Van Deveer vs. Phillips and Buttorf, 112 Fed. 966..... | 21 |
| Watts, Watts & Co. vs. Unione Austriaca, 239 Fed. 1023 (2nd Circuit) | 20 |
| Wayne United Gas Co. vs. Owens-Illinois Glass Co., 300 U. S. 131, 81 L. Ed. 557..... | 26, 29, 30 |
| Willis vs. Davis, 184 Fed. 889 (6th Circuit)..... | 26 |
| Wright vs. Union Central Life Insurance Co., 304 U. S. 502, 82 L. Ed. 1490 | 36, 38 |
| Wright vs. Vinton Branch, 300 U. S. 440, 462, 81 L. Ed. 736, 743 | 47 |

In
The Supreme Court
of the United States

OCTOBER TERM, 1940

No. 54

MARTIN J. BERNARDS and LENA BERNARDS,
his wife,

Petitioners,

vs.

M. R. JOHNSON, CATHERINE COLLINS, THE
UNITED STATES NATIONAL BANK OF
PORTLAND (OREGON), and JOSEPH M.
LOOMIS, Trustee,

Respondents.

Upon Writ of Certiorari to the United States Circuit Court of
Appeals for the Ninth Circuit.

BRIEF OF RESPONDENTS M. R. JOHNSON AND
JOSEPH M. LOOMIS, TRUSTEE.

STATEMENT OF FACTS

The statement of facts contained in petitioners' brief herein omits certain facts which respondents deem material, and includes certain statements which are not supported by the record herein. For these reasons we deem it advisable to restate the facts.

On May 2, 1939, the Circuit Court of Appeals for the Ninth Circuit rendered a decree (R. 158) affirming two orders of the District Court of the United States for the District of Oregon, and thereafter stayed its mandate to permit petitioners to file a petition for certiorari in this Court, which they filed and which was denied October 23, 1939.

Thereafter and on October 28, 1939, the mandate of the Circuit Court of Appeals duly issued.

On December 4, 1939, this Court rendered its opinion in the case of *John Hancock Mutual Life Insurance Company vs. Bartels*, —U. S.—, 84 L. Ed. Advance Opinions 154, and on January 2, 1940, petitioners filed in the Circuit Court of Appeals a motion (R. 160) "for recall and correction, amendment, revision and/or opening and vacating mandate and judgment entered thereon," this being based upon the theory that the decision of the Circuit Court of Appeals was inconsistent with the later decision of this court in the Bartels case.

On March 22, 1940, the Circuit Court of Appeals denied this motion (R. 162), to review which this court has granted certiorari.

The prior history of the case is as follows:

On April 4, 1930, petitioner Martin J. Bernards purchased for \$45,500.00 a large farm in Washington County,

Oregon, and on the same day mortgaged it to respondent M. R. Johnson for \$70,000.00, part of which was used to pay the entire purchase price and the balance for other purposes, including the purchase of certain municipal bonds of the City of Orenco. Also included in the mortgage was a smaller tract previously purchased by petitioners and mortgaged the preceding October to the respondent Catherine Collins and, as additional security to the Johnson indebtedness, petitioners pledged to Mr. Johnson the above-mentioned bonds (R. 71, 72, 135, 136, 139 and 141).

Part of the property covered by the Johnson mortgage was subsequently subordinated to a new first mortgage in favor of the World War Veterans' State Aid Commission of Oregon (R. 71).

Part of the money loaned by Mr. Johnson to petitioners was in turn borrowed by him from The United States National Bank of Portland (Oregon), and the mortgage and pledge of bonds were assigned by him to it as security therefor (R. 72).

In April, 1934, respondent M. R. Johnson filed suit in the Circuit Court of Washington County, Oregon, to foreclose the mortgage (R. 72), at which time the security had been diminished by the sale to Washington County, on tax foreclosure, of upwards of 165 acres of the land (R. 139, 140). Unpaid taxes amounted to about \$15,-

000.00 (R. 143), unpaid interest on the Johnson mortgage to over \$11,000.00 (R. 113) and the principal was also overdue.

Decree of foreclosure was entered on July 11, 1934 (R. 72).

On August 10, 1934, one day before the day set for foreclosure sale, petitioners filed their petition, under section 75 of the bankruptcy act, for a composition or extension (R. 3).

The case was referred to a Conciliation Commissioner, who made his report setting forth that no composition or extension could be had (R. 6).

The court, at the request of the petitioners, again referred the case to the Conciliation Commissioner to enable them to submit a second proposal, and the Conciliation Commissioner again reported that no composition or extension could be had (R. 8, 9).

On December 19, 1934, petitioners filed their amended petition asking to be adjudged bankrupts and, on the same day, ex parte orders were entered adjudicating them bankrupts and referring the case to a referee (R. 9-14).

On May 28, 1935, this court in the Radford case held the former subsection (s) of section 75 unconstitutional.

A month later, petitioners applied to the court for an order referring the case for a third time to a conciliation

commissioner, and the court on the same day denied that application. The order, after the opening recitals, was as follows:

"And it appearing to the Court that said debtors have heretofore been adjudged bankrupts, and their bankruptcy proceeding is now pending before Willard L. Marks, Referee in Bankruptcy.

"And it further appearing that the secured creditor has already been delayed approximately one year by proceedings under these acts,

"It is Ordered that said petition be and the same hereby is denied." (R. 145)

Thereafter, respondents proceeded with the sheriff's sales which had been theretofore prevented by the proceedings in the Bankruptcy Court.

Foreclosure sale was held on the Johnson mortgage, covering all the property including the Orenco bonds, on June 29, 1935, and on the Collins mortgage, which was foreclosed July 9, 1935, on August 26, 1935 (R. 72, 73).

The Johnson sale was confirmed July 20, 1935 (R. 108) and the Collins sale September 16, 1935 (R. 73).

After the confirmation of both sales and on September 30, 1935, petitioner Martin J. Bernards, by his attorneys, filed a petition wherein he recited the passage of the amended act, which became effective August 28, 1935, and stated that the referee to whom his case had been referred

was of the opinion that the affairs of the bankrupt estate could be better administered by the Conciliation Commissioner for Washington County, Oregon (R. 16). The prayer of this petition was for:

"An order of this Honorable Court authorizing and directing said referee to transfer to this court all documents and records in his possession in the matter of the estates of said bankrupts, together with a report of all proceedings therein to the time of said transfer."

There was no request for any other relief.

Based on this petition, the court made orders recalling the reference to Referee Marks and referring the case to the newly appointed Conciliation Commissioner Kuratli (R. 17-19).

In the meantime, the bankrupts were still in possession of the real estate, but a writ of assistance had been placed in the hands of the sheriff of Washington County. On October 3, 1935, the bankrupts secured an order temporarily restraining the sheriff from executing this writ and calling upon him to show cause why he should not be permanently restrained therefrom. Upon a showing of cause by the sheriff and hearing thereon, the court, on December 18, 1935, made an order dissolving and refusing to continue this temporary restraining order.

This order (R. 48) recited the sheriff's sale and the

confirmation thereof prior to the issuance of the restraining order "and that said Circuit Court had jurisdiction over said suit and the parties thereto and the subject matter thereof, which jurisdiction it acquired prior to the commencement of any of the proceedings herein, and that by reason thereof the threatened acts of the sheriff of Washington County (Oregon) would not constitute an interference with any property of the bankrupt as defined by the Acts of Congress."

After the entry of this order, the Sheriff of Washington County proceeded to execute his writ of assistance, and the appellees Johnson and Collins have ever since been in possession of the real property, parcels 1 to 16. *

On July 1, 1936, sheriff's deed was issued to M. R. Johnson and The United States National Bank of Portland (Oregon) covering parcels 1 to 14 and parcel 16 (R. 138), and on September 10, 1936, sheriff's deed was issued to Catherine H. Collins covering parcel 15. (R. 73).

It will be noted that thus far in the story the bankrupts have made no application for relief under the amended act, except to ask that the reference to the referee be can-

*At page 5 of petitioners' typewritten brief, which is the only one served on us, there appears a statement, not founded on the record, concerning the alleged activities at this time of a concern called the Portland Loan Company. None of the respondents had any connection whatever with this company or these activities.

celled and the case referred to a Conciliation Commissioner. There has been no request on their part that their property be appraised, as provided by the amended act, that their unincumbered exemptions be set off to them, that proceedings against them be stayed, or that they be continued in possession of any property. It will also be noted that there has thus far been no attempt to review any order of the referee or Conciliation Commissioner or to appeal from any order of the court.

On July 15, 1936, nearly a year after the passage of the amended act and after the issuance of the sheriff's deed to respondent Johnson, the bankrupts filed with the Conciliation Commissioner a petition (R. 19) wherein they recited some of the previous history of the case, including the foreclosure sales, alleged that they were farmers and entitled to the possession of the real property, and prayed "for an order granting the undersigned immediate possession, control and management of the real properties described in said bankrupt's petition and referred to as parcels Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, and 16; and for the further order restraining the Sheriff of Washington County and M. R. Johnson and the United States National Bank and Catherine Collins, and either or any of them, from transferring without purchase of said property in accordance with the terms and provisions of the Frazier-Lemke Act as amended; and for the further

order specifically extending the period of redemption as provided in said Frazier-Lemke Act." *

Even by this petition the petitioners did not ask for any appraisement or for the setting aside of exemptions or that they be allowed to retain possession of any property under the supervision and control of the court. What they did ask was that they be given possession, without any strings attached, of some real property of which they had long ago lost possession pursuant to sheriff's sales made after the termination of their composition proceedings and before the passage of the present act and pursuant to an order of the Bankruptcy Court permitting the sheriff to dispossess them, from which they had never appealed, and they also asked for the extension of a right of redemption which had already expired.

After a hearing before the Conciliation Commissioner on this petition and the cross-petitions of the creditors, the Commissioner on August 8, 1936, made an order (R. 49-53, 135-146) wherein he determined, among other things, that the bankrupts had never asked the court to appraise their property as provided by the amended act or to set aside their unincumbered exemptions and unincumbered interest or equity in their exemptions or that they be al-

*The filing date shown in the printed record is the date the Commissioner returned this record to the Clerk of the District Court. The Commissioner's filing date appears in the original typewritten record.

lowed to retain possession under the supervision and control of the court of any part of their property under the terms and conditions set forth in said act; that they had no interest in the real property and were not farmers within the meaning of the act. He further ordered that a trustee should be appointed to liquidate the assets of the bankrupts.

The applicable rule of the District Court (R. 146) allowed 20 days for filing a petition for review from the referee's order but no petition to review this order was filed by the bankrupts within that time or at all.

On August 29, 1936, the commissioner made an order appointing the appellee Joseph M. Loomis Trustee in Bankruptcy, and on September 3rd a further order approved the trustee's bond (R. 54).

The bankrupts thereupon filed a "notice of appeal" from these last two orders (R. 23). The commissioner, ignoring the informality of this method of review, transmitted his certificate to the court (R. 55) which duly reviewed and affirmed these two orders (R. 24).

On September 25, 1936, the property of the bankrupts was appraised, the foreclosed real property not being included in the appraisal (R. 58-63).

After this appraisal and on January 4, 1937, the bankrupts filed with the commissioner a petition asking that

their property be appraised "as requested in the amended petition," that exemptions be set off, that the Commissioner's order of August 8, 1936, be vacated, that the trustee be removed, that the trustee account for all property or its proceeds which came into his possession "and return it to the court for the use of the bankrupts," that the Orenco bonds, the pledge of which had been finally foreclosed before the act was passed, be returned, that an alleged cause of action on behalf of the bankrupts against M. R. Johnson be included in the schedules, and that M. R. Johnson and Mrs. Collins return all crops and proceeds of crops which they had had. (R. 25)

The trustee moved to dismiss this petition on the ground that all matters involved in it had already been adjudicated. Upon the hearing the Commissioner granted this motion to dismiss (R. 30), whereupon the bankrupts filed their petition for review.

On January 13, 1937, the bankrupts petitioned the court for an order restraining the trustee from making a sale of the nonexempt personal property, which the court denied (R. 31, 32). There was no appeal from this order.

On January 15, 1937, the bankrupts filed a petition wherein they requested in effect a general review of all previous orders in the case (R. 77). This petition and the appellees' answers thereto (R. 87, 91, 100) came on for hearing before the court, together with the review of the

commissioner's order dismissing the bankrupts' petition of January 4, 1937, and together also with a new motion for substantially the same relief, filed by the bankrupts on April 13, 1938 (R. 34).

On this hearing, the court made detailed findings (R. 64) and based thereon made two orders, one sustaining the order of the Conciliation Commissioner, as aforesaid (R. 35), and the other denying the petition and motion of the bankrupts (R. 37).

It was from these two orders that the petitioners appealed to the Circuit Court of Appeals, and they were, as aforesaid, affirmed by that court.

I.

THE CIRCUIT COURT OF APPEALS WAS WITHOUT JURISDICTION TO RECALL ITS MANDATE OR TO REVOKE OR MODIFY ITS DECREE, FOR THE REASON THAT PRIOR TO THE FILING OF THE APPLICATION THEREFOR THE TERM AT WHICH THE DECREE WAS ENTERED HAD EXPIRED AND THE MANDATE HAD ISSUED.

The decree of the Circuit Court of Appeals was rendered May 2, 1939, this being in the October, 1938 term. The mandate, having been stayed pending an application for certiorari to this court, issued in a later term. After

it had issued and been duly entered, petitioners applied to the Circuit Court of Appeals to recall it and reopen the case by reason of the subsequent decision of this Court in the case of *John Hancock Mutual Life Insurance Co. vs. Bartels*, —U. S.—, 84 L. Ed. Advance Opinions 154. Further on in this brief we intend to show that there is no inconsistency between the *Bartels* decision and that of the Circuit Court of Appeals herein but we will discuss the matter for the present as though the contrary were the case.

It has, of course, always been the law in the courts of the United States that an appellate court has control over its decision during the remainder of the term at which it was rendered, but in the interests of stability and in order, to use an oft-quoted phrase, that litigation might not outlive the litigants, this Court and the Circuit Courts of Appeal have permitted their judgments to be reopened after the term only in a few narrowly defined cases. These are as follows:

(1) The time for rehearing allowed by the rules of court may (but did not in the instant case) extend beyond the term.

(2) There are a few decisions to the effect that an appellate court may reconsider its decision after the term if its mandate has not yet issued.

(3) Even after the term and after mandate issued,

it may recall the mandate to correct a mere clerical error or to make the mandate conform to its judgment, or in case it did not have jurisdiction of the appeal.

Beyond this, under the applicable decisions, it may not go.

Petitioners in their brief have attempted to treat the question as one of laches. It is not that. It is one of jurisdiction.

The rule has been laid down by this court many times, two of the late cases being *Schell vs. Dodge*, 107 U. S. 629, 27 L. Ed. 601 and *Fairmont Creamery Co. vs. Minnesota*, 275 U. S. 70, 72 L. Ed. 168.

In the *Schell* case, a writ of error was dismissed and mandate issued, whereupon the defendants in error moved for the recall of the mandate for the purpose of awarding interest and damages for delay. This Court said *at page* 630:

"The defendants in error now apply to this court to correct the judgments and mandates in these cases so as to award to them interest as such, or as damages for delay. There is no doubt that, if the defendants in error in these cases had in season asked for judgments of affirmance, their applications would have been granted, and interest would have been allowed, in accordance with the decision just announced in *Schell v. Cochran* (ante, 543). But the difficulty now

is that we have no power to vary the judgments or the mandates, after the close of the Term, no especial right to do so in these cases having been reserved. It has always been held by this court that it has no power, after the Term has passed, and a cause has been dismissed or otherwise finally disposed of here, to alter its judgment in such a particular as that now asked for, the change of a dismissal of a writ of error, with its legal consequences, to an affirmance of the judgment below, with its legal consequences, and not an error of mere form, or a clerical error, or a misprision of the clerk, or the like. *Jackson v. Ashton*, 10 Pet., 480; *Bank v. Moss*, 6 How., 31, 38.

"The applications are denied."

In the *Fairmont* case, it was held that a motion to re-tax costs was too late after the end of the term and the issuance of the mandate.

In both of these cases this court based its lack of power upon the fact that the proposed alteration was one of *substance* and not "an error of mere form, or a clerical error, or a misprision of the clerk, or the like." That is certainly true in the instant case.

These decisions have been followed by countless decisions of the Circuit Courts of Appeals and have never been departed from by this Court.

Petitioners in their brief endeavor to avoid the effect of this rule by the contention that when the mandate of a Circuit Court of Appeals is issued at a later term than the

one in which its decision was rendered it may reconsider the decision not only during that term but during the whole of the term at which the mandate issued. *This is not the law.* The authorities cited by petitioners do not support it nor has it any foundation whatever.

On the other hand, the decisions in which the point was raised are definitely to the contrary. An example is *Foster Brothers Manufacturing Co. vs. National Labor Relations Board*, 90 Fed. (2d) 948 (4th Circuit). There the decree was rendered October 8th and the mandate issued in the following term. The court, upon being asked to recall this mandate in order to make it conform to a decision of the United States Supreme Court rendered in the interim between the original decision and the motion to recall, said:

"We are clearly without power to grant the relief asked. Not only had the time for filing a petition for rehearing expired long before the petition was filed, but the term at which the decree was entered had expired also, the mandate of the court had issued and our jurisdiction over the cause had ended. It is well settled that an appellate court is without jurisdiction to recall its mandate after the expiration of the term at which decree was entered. *Cycl. of Fed. Procedure*, Vol. 6, pp. 797; *Waskey v. Hammer*, C.C.A. 9th, 179 Fed. 273; *Reynolds v. Manhattan Trust Co.*, C.C.A. 8th, 109 Fed. 97. And it may not grant a rehearing after mandate has issued (*Sibbald v. U. S.*, 12 Pet. 448, 492, 9 L. Ed. 1167) or after the expiration of the term at which judgment was

rendered, unless jurisdiction be retained over the cause in some appropriate manner for that purpose (150 U. S. 82, 37 L. Ed. 1007) and it does not help the Board that . . . this court . . ." is in the position of "original jurisdiction. 74 Fed. (2) 834, 837.

"The petition to recall the mandate and grant a rehearing will accordingly be denied."

In *Reynolds vs. Manhattan Trust Co.*, 109 Fed. 97 (8th Circuit), cited in the Foster case, the term expired before the mandate issued, as in the instant case, whereupon an application was made to recall the mandate. The court indicated that it would have been disposed to grant the relief prayed for but held that its power to do so had expired and it no longer could.

That case although not, of course, binding on this court would seem to be on all fours with the instant one except that the mandate had not been delayed by reason of a pending application for certiorari.

However, even that circumstance was involved in *Hart vs. Wiltsee*, 25 Fed. (2d) 863 (1st Circuit). There the decree of the Circuit Court of Appeals was rendered on May 17th. A petition for rehearing filed June 24th was denied July 11th. A motion for stay of mandate by reason of a petition for certiorari was filed July 15th and granted August 2nd until further order of the court. The Supreme Court denied certiorari on December 1st, after the term, and on the same day the Circuit Court of Appeals ordered

that mandate issue. On January 3rd of the following year, the appellee moved to amend the final decree with regard to costs. The Circuit Court of Appeals denied this motion the same day. On January 4th the mandate issued. Appellee moved to recall the mandate, which motion the court denied, saying:

"The term of this court at which the final decree of May 17, 1927, was entered ended October, 1927, and after the close of that term this court had no power or jurisdiction to revoke or modify the award of costs made in that decree, unless the same were reserved by its order of October 3, 1927. (Citing authorities.) All of these cases hold that, after the close of the term at which a final decree has been entered, it cannot be modified in any matter of substance, but only for clerical errors.

"October 3, 1927, the following order was entered in this court:

"It is now here ordered that all causes not decided and all business of the term not disposed of be, and the same hereby are, continued until the next term, subject to and reserving the power and jurisdiction of the court over any cause until mandate issues under rule 32."

"By this order the court reserved to itself power and jurisdiction over pending cases until mandate should issue.

"As its mandate in this cause issued January 4, 1928, its power and jurisdiction over it so far as it had been reserved, ceased. After that it could recall its mandate for the purpose of correcting clerical

errors, or mere matters of form, but the award of costs is a matter of substance, and the court is without power and jurisdiction to revoke or modify its final decree in respect thereto."

This Court definitely recognized the rule in *Schell vs. Dodge*, *supra*. Four cases were tried together there and it appears from the report that the cases were dismissed November 21, 1881; that in three of them the mandates were not issued until after the close of the term, which would be in the October Term, 1882; that the motion to recall was submitted in that same term, on April 16, 1883. If petitioners' contention were correct the motion would have been in time, but the Court held otherwise.

Miocene Ditch Co. vs. Campion, 197 Fed. 497 (9th Circuit) and *Staupe Mfg. Co. vs. Labombarde*, 247 Fed. 879 (1st Circuit), cited in petitioners' brief, not only do not support petitioners' point but contain dicta to the contrary. In both of those cases the mandate issued at the same term as the opinion but the decision was based on the ground that the term *at which the judgment was rendered* had expired.

Absolutely the only case which we have been able to find where the mandate of an appellate court of the United States was recalled to correct a matter of substance after the term when the decision was rendered is *Utah Power & Light Co. vs. United States*, 242 Fed. 924 (8th

Circuit). This was in effect a consent decision, for both parties to the appeal joined in moving the court for a reconsideration of its decision to make it conform to the decision of this Court in another case between the same parties and involving the same question. It was granted without discussion.

See also, as illustrations of the general rule, *Watts*, *Watts & Co. vs. Unione Austriaca*, 239 Fed. 1023 (2d Circuit), *Sundb Electric Co. vs. Cutler-Hammer Mfg. Co.*, 244 Fed. 163 (2d Circuit), *Hawkins vs. Cleveland, C., C. & St. L. Ry. Co.*, 99 Fed. 322 (7th Circuit), and *Casey vs. Sterling Cider Co.*, 15 Fed. (2d) 52 (1st Circuit).

Petitioners, in order to make their application timely, cite the rule that there are no terms in a court of bankruptcy. That is true, but it does not help petitioners' case, for it is limited to "courts of bankruptcy" and a Circuit Court of Appeals, even when hearing an appeal from a bankruptcy court, is not a court of bankruptcy. The Bankruptcy Act itself (11 U.S.C.A. Sec. 1) defines "courts of bankruptcy," including in the definition only district courts and their referees, and distinguishes between them and "appellate courts," which include the Circuit Courts of Appeal. The latter have the same terms and are subject to the same limitations of jurisdiction in connection with them irrespective of the type of litigation before them, bankruptcy or otherwise.

We quote from *Title 11 U. S. C. A., section 1*, as follows:

"The words and phrases used in this title and in proceedings pursuant hereto shall, unless the same be inconsistent with the context, be construed as follows:

(3) 'appellate courts' shall include the circuit courts of appeals of the United States, the Court of Appeals of the District of Columbia, the supreme courts of the Territories, and the Supreme Court of the United States; (8) 'courts of bankruptcy' shall include the district courts of the United States, the Supreme Court of the District of Columbia, and the United States courts of Alaska, Hawaii, and Porto Rico."

Remington on Bankruptcy (4th Ed) sec. 502, says:

"The Circuit Court of Appeals may correct errors of the courts of bankruptcy, but it is not itself a court of bankruptcy, and the doctrine that 'there are no 'terms of court' in bankruptcy' does not seem to be applicable to its decrees; and such a decree rendered on an appeal, even if the matter were not appealable, cannot be vacated after term, and is not a nullity."

The cases cited by petitioners, *Sandusky vs. National Bank*, 23 Wall. 289, 23 L. Ed. 155, *In re Glory Bottling Company of New York, Inc.*, 283 Fed. 110, and *Van Deveer v. Phillips and Buttorf*, 112 Fed. 966, are not so the contrary. They deal solely with proceedings in the district court.

In the instant case, when petitioners made their application in the Circuit Court of Appeals to recall its man-

date and reopen the case, the term at which its decision was rendered had long since expired, as had the time for rehearing. The mandate had been issued and had been entered in the District Court. It is not contended that the mandate does not conform to the opinion of the Circuit Court of Appeals nor is there any contention that that court did not have jurisdiction of the appeal. It is sought to change the mandate in matter of substance. These things being so, we respectfully submit that the Circuit Court of Appeals had no jurisdiction to do otherwise than to deny the application.

II.

THIS IS NOT A CASE WHERE PETITIONERS' MOTION IN THE CIRCUIT COURT OF APPEALS SHOULD BE TAKEN AS AN APPLICATION FOR LEAVE TO FILE A BILL OF REVIEW OR PETITION FOR REHEARING IN THE DISTRICT COURT.

(1) The subsequent decision of a higher court neither demonstrates an error of law apparent upon the face of a decree nor constitutes such new matter as will sustain a bill of review to vacate it.

In the words of an editorial note in 95 *A. L. R.*, page 708, "it is well settled that a change in an authoritative rule of law, resulting from a decision by the United States

Supreme Court, announced subsequently to a former final decree, neither demonstrates an error of law apparent upon the face of that decree, nor constitutes new matter in pais, sufficient to justify the granting of a bill of review to reverse or modify the allegedly erroneous decision, on the ground that the new rule of law would have required a different result if it had been applied in the earlier case."

This rule has been laid down by this Court in *Scotten vs. Littlefield*, 235 U. S. 407, 59 L. Ed. 289 and *John Simmons Co. vs. Grier Bros. Co.*, 258 U. S. 82, 66 L. Ed. 475.

Any other rule, as said in *Tilghman vs. Werk*, 39 Fed. 680, 682, "would prolong litigation greatly and render judicial decisions untable in the highest degree."

Since there is no limit, aside from the doctrine of laches, to the time in which a bill of review may be filed, it is apparent that no judicial decision would ever be surely settled if it could at any time be upset by a decision in some other case between other parties.

The instant case comes squarely within this rule. The Circuit Court of Appeals had rendered its final decision, this Court had denied certiorari, mandate had issued, and the decision had become final, when this Court decided another case (the *Bartels* case) between other parties, which in petitioners' estimation would have called for a different decision had it been before the Circuit Court of

Appeals. To be sure, the *Bartels* decision followed quite closely after the issuance of the mandate herein but it might equally as well have come ten years afterwards. The line must be drawn somewhere and the authorities have quite properly drawn it at, not after, the time when the decision of the lower court becomes final.

The case of *National Brake & Electric Co. vs. Christensen*, 254 U. S. 425, 65 L. Ed. 341, is not an exception to the general rule for there the decision relied on was between the same parties, involving the same subject matter, and was claimed as *res judicata*, not merely *stare decisis*. This case consequently did not come within the rule, for *res judicata* is held to be "new matter."

Incidentally there was, in the petition in that case, a prayer for general relief which was relied on by the court as enabling it to treat what was in terms a petition to the Circuit Court of Appeals to reopen and rehear the case as a petition for leave to file a bill of review in the court below. There is no prayer for general relief in the petition here under review. Again, in that case, the Circuit Court of Appeals had declined to consider the petition on the ground that it had no jurisdiction to do so. This Court sent the case back to it without decision on the merits so that it might exercise its discretion to grant or deny the application. In the instant case, the Circuit Court of Appeals having rendered no opinion, it may well

be that it considered the application on its merits and concluded that there was no error in its previous decision.

(2) This was not a case for rehearing in the District Court under the doctrine of John Simmons Co. vs. Grier Bros. Co., supra.

That was a patent case in equity wherein, after a Circuit Court of Appeals had passed on an interlocutory decree of the court below but while the case was still pending in the latter court, application was made to the Circuit Court of Appeals for leave to apply for a rehearing in the court below by reason of a subsequent decision of this Court, in another case but involving the validity of the same patent. This Court held that it was not error for the Circuit Court of Appeals to grant the application, saying that the rule hereinbefore discussed regarding bills of review did not apply because the decree involved was interlocutory.

This case has no application to the instant one for two reasons: In the first place, the decision of the court that the Simmons decree was interlocutory because an accounting was ordered was based on the rule that there can be but one final decree in an equity suit. That is not true in bankruptcy. If nothing more remained to be done in the Bankruptcy Court in order to determine the rights of the parties in the instant case, then the decree of the Circuit Court of Appeals was final. So far as the real estate

and the respondents Johnson, Collins and the bank were concerned, it would appear self evident that nothing more did remain to be done.

Another well settled rule of law makes the Simmons decision inapplicable, namely, that *the denial of a petition for rehearing is not appealable.*

As stated by the Circuit Court of Appeals for the Eighth Circuit, in *First Trust & Savings Bank vs. Iowa-Wisconsin Bridge Co.*, 98 Fed. (2d) 416 at 428:

"The granting of a rehearing is within the court's sound discretion, and a refusal to entertain a petition therefor, or the refusal of the petition, if entertained, is not the subject of appeal."

This rule has been declared by this court in *Wayne United Gas Co. vs Owens-Illinois Glass Co.*, 300 U. S. 131, 81 L. Ed. 557, *Conboy, Trustee in Bankruptcy vs. First National Bank of Jersey City*, 203 U. S. 141, 51 L. Ed. 128, and *Roemer vs. Neumann*, 132 U. S. 103, 33 L. Ed. 277. See also to the same effect: *In re McIntosh*, 95 Fed. (2d) 627 (9th Cir.), *Schram vs. Poole*, 97 Fed. (2d) 566 (9th Cir.), *Willis vs. Davis*, 184 Fed. 889 (6th Cir.), *In the matter of Republic Pipe & Iron Corp.*, 73 Fed. (2d) 1010 (2nd Cir.), *Clarke vs. Hot Springs Electric Light & Power Co.*, 76 Fed. (2d) 918 (10th Cir.), and *United States vs. Dowell*, 82 Fed. (2d) 3 (8th Cir.).

In the Simmons case, the orders complained of *granted*

a rehearing. In the instant case, it was denied. Even if petitioners' motion to reponere were to be considered an application for leave to file a petition for rehearing in the District Court, in spite of the fact that it was not that and contained no prayer for general relief and in spite of the finality of the decree sought to be reopened, the denial of such application would not, under the above authorities, constitute reversible error, for to make a distinction between the denial of a petition for rehearing and the denial of a petition for leave to file a petition for rehearing in a lower court would be to make of the latter application a meaningless formality.

III.

THE DENIAL OF PETITIONERS' MOTION BY THE
CIRCUIT COURT OF APPEALS WAS PROPER
BECAUSE THERE WAS NO ERROR IN THAT
COURT'S JUDGMENT ON THE MERITS.

(1) The matters involved in the orders of the District Court from which appeal was taken to the Circuit Court of Appeals had all been previously determined by the District Court, and the time for appeal from such determination had long since expired.

It will be recalled that after the sheriff's sales of the real property here involved had taken place and been

confirmed, during the interim between the Radford decision and the passage of the present Frazier-Lemke Act, a writ of assistance was placed in the hands of the Sheriff of Washington County, which the Bankruptcy Court temporarily enjoined him from executing, but that in December, 1935, after a hearing, the restraining order was dissolved on the ground that "the threatened acts of the Sheriff of Washington County (Oregon) would not constitute an interference with any property of the bankrupt as defined by the Acts of Congress."

By this order, of course, the District Court necessarily determined that the bankrupts were not entitled to the possession of the real property. We will hereinafter explain why we think the order was correct but the point we wish to make now is that no appeal from it was ever attempted.

Again, on August 8, 1936, after the sheriff's deed had issued, the Conciliation Commissioner heard a petition of the bankrupts and a cross-petition of the respondents herein other than Mr. Loomis, and made an order determining, among other things, that the bankrupts had not made application for the benefits of the Frazier-Lemke Act in accordance with its terms and were not entitled thereto, were not farmers, could not refinance themselves within the meaning of the Act and had no interest in the real property, that said real property was not within the

jurisdiction of the Bankruptcy Court and that a trustee in bankruptcy should be appointed to liquidate the estate. No review of or appeal from this order was ever attempted.

On December 15, 1936, the District Court affirmed on review orders of the Commissioner appointing the appellee Loomis Trustee in Bankruptcy and approving his bond. The order of affirmance was never appealed from and stands as *res judicata* that the trustee was properly appointed and duly qualified.

The District Court on January 13, 1937, denied an application of the bankrupts for an order restraining the trustee from selling the personal property, thereby determining again that it was proper for the trustee to liquidate this property. This was not appealed from.

The orders from which the bankrupts appealed simply denied again new applications for the same relief which had already been denied in these earlier orders. They constituted in effect simply an attempt to renew rights of appeal which had expired. That this will not be permitted is too clear for discussion. However, the following are a few of the decisions so holding:

Wayne United Gas Co. vs. Owens-Illinois Glass Co., 300 U. S. 131, 81 L. Ed. 557;

Patents Process vs. Durst, 69 Fed. (2d) 283 (9th Circuit) (order of referee in bankruptcy);

Grande vs. Arizona Wax Paper Co., 90 Fed. (2d) 801 (9th Circuit) (order of referee in bankruptcy);

Roberts Auto & Radio Supply Co. vs. Dattle, 44 Fed. (2d) 159 (3d Circuit);

McWilliams vs. Blackard, 96 Fed. (2d) 43, 45, (8th Circuit) (a Frazier-Lemke case);

Marcy vs. Miller, 95 Fed. (2d) 611, 612 (10th Circuit);

Mintz vs. Lester, 95 Fed. (2d) 590, 591 (10th Circuit).

The instant case does not come within the exception laid down in the *Wayne* case, *supra*, to the effect that if a petition for rehearing is "entertained" there may be an appeal from the order determining the matter on rehearing even though the time for appeal from the original order had expired, because here the new application for the same relief was not "entertained". On the contrary, the Conciliation Commissioner dismissed the bankrupts' petition of January 4, 1937, on the express ground that the matters involved therein had been previously adjudicated, and this dismissal was sustained by the District Court.

Neither does the case come within the exception made in the decisions to the effect that a referee's order does not become *res judicata* unless entered on an adversary hearing, for the referee's orders here involved *were* entered upon adversary hearing.

(2) The foreclosure sales of the real estate were valid and the bankrupts had lost title thereto before they invoked the benefits of the amended Frazier-Lemke Act.

It will be recalled that the foreclosure sales herein took place and the sale covering all of the property was confirmed prior to the enactment of the amended Frazier-Lemke Act in August, 1935, and after the decision of this court in the Radford case. Petitioners had filed their amended petition under the original subsection (s) and had been duly adjudicated bankrupts, and such adjudication had never been set aside. Petitioners now contend, as we understand them, that the adjudication was wholly void by reason of the invalidity of the former subsection (s). They deduce from this that the composition and extension proceedings, and therefore the automatic stay provided for by subsection (o), were still pending at the time of the sales and that the jurisdiction of the State Court was thereby ousted.

Our own position is, in the first place, that the invalidity of subsection (s) could not operate to invalidate the adjudication of bankruptcy.

Petitioners *had a right*, under the general bankruptcy law, to be adjudicated voluntary bankrupts. *They made application* therefor to a court having jurisdiction. *They were duly adjudicated.*

Their petition for adjudication (R. 10) recited:

"that they desire to obtain the benefits of the Acts of Congress relating to bankruptcy and particularly Section 75 thereof, as amended by an act entitled 'An Act to Amend an Act entitled 'An Act to establish a uniform system of bankruptcy throughout the United States,' approved July 1, 1898, and Acts amendatory thereof and supplementary thereto'; approved June 28, 1934."

Its prayer (R. 11) was as follows:

"Wherefore, your petitioners pray that they, and each of them be adjudged by this court to be bankrupts within the purview of said Acts of Congress."

The orders of adjudication followed exactly Official Form No. 12, prescribed for use in general bankruptcy proceedings, without any change or any reference to the Frazier-Lemke Act or subsection (s).

The enactment of the original subsection (s) offered to petitioners the prospect that *if they first took a certain step, namely, voluntary bankruptcy*, which even before the Act was passed they could have taken, they would then be permitted to take another step leading to a rental stay order. They took the first of these steps. They could not take the second because of the Radford decision but that did not alter the fact that *the first step had been taken*. It had been taken under a misapprehension, to be sure, and they might have retraced it by applying for dis-

missal, but nevertheless it had been taken, and they never tried to retrace it.

So, after the Radford decision, this case continued pending as an ordinary bankruptcy, and the reference to a referee in bankruptcy as distinguished from a conciliation commissioner continued unrevoked, although, in June, 1935, petitioners applied to the court for a third reference to a conciliation commissioner and the court denied it on the express ground that petitioners *were in bankruptcy*.

Subsection (o) provides that proceedings in other courts shall not be maintained:

"at any time after the filing of the petition under this section (i.e., the original debtor petition) and prior to the confirmation or *other disposition* of the *composition or extension proposal* by the court."

The meaning of this is clear, and it is equally clear that the adjudication of bankruptcy was a *disposition by the court* of any composition or extension proposal that had been made. No such proposal was any longer before the court. Not only is this obvious from the plain words of subsection (o) but from its purpose as well, for when it was enacted there was no subsection (s) at all. It was intended simply to preserve the status quo until the debtor could make his offer and have it considered by the creditors and the court. When he abandoned his attempts at

composition or extension and turned to some other form of proceeding, *the purpose of the stay was at an end.*

All this would, as a matter of fact, be true even if the adjudication had failed as such or been subsequently vacated; it would simply have been effective as a *disposition*.

This Court recognized the purpose and limitations of proceedings under subdivisions (a) to (r) when it adopted General Order No. 50, under which, had there been no adjudication in bankruptcy, it would have been the duty of the court to dismiss the proceedings not later than three months after the first meeting of creditors.

Under that General Order, had there been no adjudication, it would have been the duty of the court to dismiss the debtor proceedings even before the Radford decision had been handed down.

Petitioners cite *Union Joint Stock Land Bank vs. Byerly*, —U. S.—, 84 L. Ed. Adv. Sheets 689, in support of their position, saying in their brief that there was in that case an adjudication under former subsection (s) and that this court nevertheless treated the case as if the stay was still in effect until the case was dismissed. Petitioners are mistaken. There was a petition for adjudication but no adjudication under former subsection (s) in the *Byerly* case.

At the time of the foreclosure sales, then, subsection (o) did not stand in the way of them. The present sub-

section (s) had not been enacted. However, petitioners were in general bankruptcy and they will perhaps contend that this in itself was enough to invalidate the sales. The law is otherwise. It is to the effect that when a foreclosure proceeding is commenced in a state court prior to the commencement of bankruptcy proceedings, as was the case here, the state court retains jurisdiction after bankruptcy and the foreclosure may be completed. To this effect are:

Eyster vs. Gaff, 91 U. S. 521, 23 L. Ed. 403;

In re Gillette Realty Co., 15 Fed. (2d) 193 (9th Circuit);

In re Rohrer, 177 Fed. 381 (6th Circuit);

In re Gerdes, 102 Fed. 318 (So. Dist. Ohio).

To the same effect in principle are:

Straton vs. New, 283 U. S. 332, 75 L. Ed. 1060;

Davis vs. Friedlander, 104 U. S. 570, 26 L. Ed. 818;

which dealt with the enforcement of liens acquired by legal proceedings more than four months before bankruptcy.

The sales not having been inhibited by the proceedings in the Bankruptcy Court, it now becomes necessary to consider their effect, and this leads necessarily to a discussion of State law.

The essential feature for present purposes of the Ore-

gon practice regulating mortgage foreclosure is that the purchaser at the sale is entitled to the possession of the property *from the day of sale*. Sales of personal property are final at once, without right of redemption.

We believe no other case has come before this court under the Frazier-Lemke Act involving a similar statute. In the other cases, such as *Wright vs. Union Central Life Insurance Co.*, 304 U. S. 502, 82 L. Ed. 1490, involving the Indiana law, and *Kalb vs. Feuerstein*, —U. S.—, 84 L. Ed. Adv. Sheets 281, involving the Wisconsin law, the right of possession did not pass until the expiration of the period of redemption.

The pertinent Oregon statutes are as follows:

Oregon Code 1930 section 6-504:

"The decree may be enforced by the execution as an ordinary decree for the recovery of money, except as in this section otherwise or specially provided:

"1. When a decree of foreclosure and sale is given, an execution may issue thereon against the property adjudged to be sold. If the decree is in favor of the plaintiff only, the execution may issue as in ordinary cases, but if it be in favor of different persons, not united in interest, it shall issue upon the joint request of such persons or upon the order of the court or judge thereof on the motion of either of them; * * *

Oregon Code 1930 section 6-507:

"A decree of foreclosure shall order the mort-

gaged property sold, and property sold on execution issued upon a decree may be redeemed in like manner and with like effect as property sold on an execution issued on a judgment, and not otherwise. A sheriff's deed for property sold on execution issued upon a decree shall have the same force and effect as a sheriff's deed issued for property sold on an execution issued on a judgment."

Oregon Code 1930 section 6-302:

"The provisions of sections 3-101—3-108, inclusive, and sections 3-207—3-507, inclusive, and sections 3-509—3-606, inclusive, of this Code, shall apply to the enforcement of decree so far as the nature of the decree may require or admit of it; but the mode of trial of an issue of fact in a proceeding against a garnishee shall be according to the mode of trial of such issue in a suit."

Oregon Code 1930 section 3-510:

"The purchaser from the day of sale, until a resale, or a redemption, and a redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same be in the possession of a tenant holding under an unexpired lease, and in such case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period."

Decisions showing that sales of personal property on execution are without redemption are:

Roseburg Nat. Bank vs. Camp, 89 Ore. 67, 71;
Dixie Meadows Co. vs. Kight, 150 Ore. 395, 405.

Under the Indiana law, which this court applied in the *Wright* case, there was a year's redemption period during which the mortgagor was entitled to remain in possession and continue in the enjoyment of the property as if no sale had taken place.

The Wisconsin law, applied in *Kalb vs. Feuerstein, supra*, provided for a year's stay of execution after decree, followed by a sale without redemption, thus arriving at the same result as the Indiana law.

The Ohio law, applied in *Union Joint Stock Land Bank vs. Byerly, supra*, authorizes redemption until confirmation of sale and permits the mortgagor to remain in possession until such confirmation.

Thus it was true that in all those cases, as Mr. Justice Reed said in the *Wright* case:

"The person whose land has been sold at foreclosure sale and now holds a right of redemption is, for all practical purposes, in the same debt situation as an ordinary mortgagor in default; both are faced with the same ultimate prospect, either of paying a certain sum of money, or of being completely divested of their land. * * * (p. 514)

"The rights of the purchaser are preserved, the possibility of enjoyment is merely delayed. The rights of a purchaser, who under the state law is entitled to the redemption money or possession within a year, are not substantially different from those of a mortgagee entitled, on the maturity of the obligation, to payment or sale of the property." (p. 516)

Under the Oregon practice, however, the purchaser at execution sale has not merely the *possibility* of enjoyment at the expiration of the period of redemption; he has a *present right* thereto. The mortgagor does not merely face the possibility of being divested of his property; he *has been divested*. The right of redemption does not delay the effectiveness of the sale as it does in the other States mentioned. It constitutes in effect *merely an option to repurchase*.

In the *Wright* case, the provision of amended subsection (n) extending the period of redemption was enough to enable the court to grant Wright a three-year stay, for at the time Wright applied for the benefits of the act he was rightfully in possession and entitled to continue so as long as the redemption period continued. On the other hand, petitioners herein were *not* rightfully in possession at the time amended subsection (n) went into effect. They were mere trespassers, *for the sheriff's sales had transferred all rights of possession and enjoyment to the respondents Johnson and Collins*. There was nothing to which subsection (n) could apply except an incorporeal right in the nature of an option and, except for this incorporeal right, the situation was exactly the same as that of the smaller tract of land in the *Wright* case, the sale of which had become final prior to the amendment of the statute. As to the Orenco bonds, which were sold sep-

arately at the same time as the real property, petitioners had no right whatever in them, for as personal property they were sold without redemption.

It may well be doubted whether subsection (n) was intended to apply at all to a right of redemption of the Oregon type, for it contemplates possession and there can be no possession of an option, but even if its provisions were applicable their mere enactment changed nothing, as this court expressly held in the *Byerly* case. It was necessary, if petitioners were to enjoy any rights under the amended Act, for them to make due application therefor.

Subsection (s) as amended provides (italics ours):

"(s) Any farmer failing to obtain the acceptance of a majority in number and amount of all creditors whose claims are affected by a composition and/or extension proposal, or if he feels aggrieved by the composition and/or extension, may amend his petition or answer, asking to be adjudged a bankrupt. Such farmer *may, at the same time, or at the time of the first hearing, petition the court that all of his property wherever located, whether pledged, encumbered, or unencumbered, be appraised, and that his unencumbered exemptions, and unencumbered interest or equity in his exemptions, as prescribed by State law, be set aside to him, and that he be allowed to retain possession, under the supervision and control of the court, of any part or parcel or all of the remainder of his property, including his encumbered exemptions, under the terms and conditions set forth in this section. Upon such a request being made, the referee,*

under the jurisdiction of the court, shall designate and appoint appraisers, as provided for in this title."

We respectfully submit that under these words there are certain things a farmer must do if he wants the benefits of the Act. *First*, he must be adjudicated a bankrupt. That had been done. *Second*, he must *petition the court* that (a) *his property be appraised*, and (b) *his exemptions be set aside to him*, and (c) *he be allowed to retain possession, under the supervision and control of the court, of his property*. This application must be made not later than *the time of the first hearing*.

Petitioners in the instant case made no such application *at the time of the first hearing*. This has been held jurisdictional in *Pearce vs. Collier*, 92 Fed. (2d) 237. They did not ask to be *allowed to retain possession* of any property until their petition of July 15, 1936 (after the sheriff's deed to Johnson had issued) and even then they did not ask that such retention be "*under the supervision and control of the court*". They did not ask for *appraisal* or that *exemptions be set aside* until their petition of January 4, 1937, long after the trustee had been appointed and begun to function.

The statute provides that "*upon such a request being made*" the referee shall appoint appraisers, who shall appraise the property in the manner provided. *When the appraisement has been made*, it becomes the duty of the

referee to set aside exemptions and make an order for the possession of the property under the control of the court and "*when the conditions set forth in this section have been complied with*" the court is then to order a three-year rental stay. But in the instant case, until long after the redemption period had expired, the referee could not appoint appraisers because no request therefor had been made, either at the time of the first hearing or later, and therefore there could be no appraisal under the Act and, consequently, no order for possession and no rental stay order.

When the application was finally made in January, 1937, it came too late, not only because it had not been made at the time of the first hearing but because, by that time, the petitioners had no farm and, under the doctrine of *Union Joint Stock Land Bank vs. Byerly*, —U. S.—, 84 L. Ed. Advance Sheets 689, such an order would have been vain. Even had it been then made, it could not have affected the respondents Johnson and Collins, for their rights had long ago become final and complete.

Until after the redemption period had expired, petitioners did nothing at all to invoke the act except to file their petition of September 30, 1935, wherein they prayed in effect that the case be taken from Referee Marks, and to apply for and secure a temporary restraining order, which the court later dissolved, to restrain the Sheriff of

Washington County from acting under a writ of assistance against them.

In their first application for certiorari petitioners tried to bring themselves within the terms of the Act by the remarkable claim that their petition of February 8, 1935, for the benefits of former subsection (s), (R. 36) should be taken as an application for the benefits of amended subsection (s). They claimed, and claim again in their present brief, that this petition was "re-filed" on October 10, 1935, and was thereby given new life and spoke as of that date. The fact is, however, as clearly appears from the filing endorsements on the typewritten record herein, although not on the printed record, that this petition was originally filed with the referee, in spite of being addressed to the judges, and was returned to the clerk of the court by the referee with his final report, whereupon the clerk of the court put his filing stamp on it for the first time. This was merely part of the clerk's office routine—done without any request on the part of petitioners and probably even without their knowledge. It certainly could not transmute an application made in February, 1935, for the benefits of the old Act into an application made in October, 1935, for the very different benefits of a subsequent statute.

At this point we have seen that by the foreclosure sales in the summer of 1935 petitioners lost all their interest in the real property except the bare legal title and a right to

reclaim the beneficial ownership within a year. We have seen that that year passed without the necessary steps having been taken to invoke the Act, so that even the right of redemption had ceased to exist. We must now consider the proceedings that followed petitioners' application of July 15, 1936.

(3) The acts of the referee in appointing a trustee and liquidating the nonexempt personal estate were not erroneous.

We have pointed out that there was no attempt to review the referee's order directing the appointment of a trustee and the liquidation of the estate and that there was no appeal from the order of the court affirming, on review, the order appointing the trustee and the order approving his bond and that this and the subsequent orders in the administration of the estate have become res judicata.

Aside from that, however, the referee's order of August 8, 1936, was based on findings to the effect that petitioners were not farmers (R. 52) and had not complied with the requirements of the statute (R. 50). The evidence not having been made a part of the record, the court must presume that the findings were well founded.

Heffron vs. Western Loan & Building Co., 84 Fed. (2d) 301, 305 (9th Circuit);

Bank of Eureka vs. Partington, 91 Fed. (2d) 587, 590 (9th Circuit).

Furthermore it appeared specifically from the findings that petitioners had then no real property except an undivided one-eighth interest in a tract of property (not otherwise here involved) which was rented to a tenant who had been paying no rent (R. 52), and that they had made, until July 15, 1936, no application for the benefits of the Act and then had not applied for appraisal or the setting aside of exemptions or that the possession of real property which they did pray for be under the supervision and control of the court (R. 50).

Under the circumstances and under the doctrine of the *Byerly* case, *supra*, it would not have been proper for the referee to attempt to grant them any relief under subsection (s), for as this court said in the *Byerly* case (page 694), it would have been a vain thing to do so.

The only other course which the referee could take, in the absence of any petition for dismissal on the part of the bankrupts, was to continue the administration in bankruptcy in the usual course, which he did. We submit that there was no error in this, although we reiterate that had it been error the bankrupts could have taken advantage of it only by an appeal within the time allowed by law.


A trustee being necessary, respondent Loomis was elected and duly appointed and his appointment and qualification were approved by the judge on review. He

has done no acts except under and pursuant to orders of the court, duly made and not appealed from. We submit that even if those orders, or any of them, were for some reason erroneous the trustee was nevertheless entitled to rely on them and was protected by them.

IV.

THE RECENT DECISIONS OF THIS COURT

(1) *John Hancock Mutual Life Insurance Co. vs. Bartels*, —U. S.—, 84 L. Ed. Advance Sheets 154.

This is the case upon which petitioners based their application to the Circuit Court of Appeals to reopen their case. It was pending in this court at the time petitioners' first application for certiorari was denied by this court and was decided after the mandate of the Circuit Court of Appeals had issued and had been duly entered in the District Court. In that case, proceedings were begun after the enactment of the amended Frazier-Lemke Act in 1935. Thereafter there was an adjudication under subsection (s), and a timely request for appraisal, exemptions, etc. The adjudication was subsequently vacated by the District Court on the ground that there had been no good faith offer for the extension or composition and on the further ground that there was no possibility of the debtor rehabilitating himself within three years. 

The Circuit Court of Appeals for the Fifth Circuit reversed that decision on the ground that the debtor had a right to be adjudicated a bankrupt whether or not he was entitled to the benefits of subsection (s) and this court sustained the latter decision on the ground that a good faith proposal of composition or extension was not a requisite to relief under subsection (s) and on the further ground that the debtor's ability to rehabilitate himself could not be considered until after the entry of the stay order.

The dictum of Mr. Justice Brandeis in *Wright vs. Vinton Branch*, 300 U. S. 440, 462, 81 L. Ed. 736, 743, contained in footnote six, was expressly overruled.

Want of good faith and inability to rehabilitate were among the grounds for affirmance which we urged in the court below, and appear to have been considered by that court along with the other reasons presented on behalf of respondents. That, however, is no ground for reversal, for the court had other sufficient grounds, namely, that the bankrupts having theretofore lost all title to the real estate, "the court could not properly have granted appellants' petition of January 15, 1937, or their motion of April 13, 1938." (R. 156), that when the sales took place there was no stay in effect, and that according to the findings of the District Court the bankrupts "have made no attempt to comply with the conditions required of them

by the 'Frazier-Lemke' amendment to the Acts of Congress in relation to bankruptcy, necessary to be complied with by them in order to obtain the right and privilege of a three years' stay of enforcement of the obligations owned and held by their creditors and possession of the real and personal property described in the schedules." However, even if in the opinion of the court below no reasons for its decision had been given except want of good faith and inability to rehabilitate, which the *Bartels* decision holds immaterial, that would still be no ground for reversal if any other reason were suggested or occurred to this Court which would justify the decision. *United States vs. American Railway Express Co.*, 265 U. S. 425, 435, 68 L. Ed. 1087, 1093. We have hereinbefore suggested a number of reasons why, in our view, the decision of the court below was correct.

(2) *Kalb vs. Feuerstein*, ——U. S.——, 84 L. Ed. Advance Sheets 281.

In the *Kalb* case, a petition under section 75 was filed in 1934 and dismissed June 27, 1935, without any adjudication in bankruptcy having taken place. Foreclosure sale was had July 20, 1935. The Frazier-Lemke proceedings were reinstated September 6th and the sale was confirmed September 16th. No adjudication under subsection (s) having taken place, the case involved only the automatic

stay under subsection (o) and the effect of the confirmation order in the State Court, had after the reinstatement had revived the automatic stay. This Court held that the act of the State Court in confirming the sale and the subsequent acts of the State Court and its officers were absolutely void. It held, in other words, that during composition and extension proceedings a State Court has no jurisdiction whatever. That was the full extent of the decision.

It is obvious that this can have no application to the instant case, for here no composition or extension proceedings were pending at any time when any proceedings were taken in the State Court or by State officers. Neither, if that makes any difference, were any proceedings under amended subsection (s) pending during any such time, for the foreclosure decree was rendered before any proceedings in the Bankruptcy Court, sale and confirmation took place after the composition and extension proceedings had terminated and before amended subsection (s) was passed, and sheriff's deed issued before any application for its benefits by the petitioners.

(3) *Union Joint Stock Land Bank vs. Byerly*,
—U. S.—, 84 L. Ed. Advance Sheets 689.

In this case, debtor proceedings were filed in 1934. There had already been a decree of foreclosure and the

Bankruptcy Court made an order permitting the foreclosure sale to be held but not permitting it to be confirmed. The case was in Ohio and, under Ohio law, the mortgagor is entitled to redeem, and to retain possession, until confirmation. *Heidelbach vs. Slader*, 1 Handy 456.

In February, 1935, an amended petition was filed but no adjudication of bankruptcy took place. In August, 1935, the case was dismissed on application of the debtor. Thereafter, the sale was confirmed and, after that, a motion for reinstatement of the debtor proceedings was filed and granted. Subsequently, the court made an order of disclaimer as to the real property and denied a requested reference to a conciliation commissioner. This court held that the order permitting sale during the debtor proceedings was erroneous but not void, saying (*at page 693*):

"The District Court did not lose jurisdiction by erroneously construing or applying provisions of the statute under which it administered the bankrupt estate. Its order was voidable but not void and was not to be disregarded or attacked collaterally in the State Court."

Since the order was valid, it was held that the sale was valid and, therefore, its confirmation was effective, and when the proceedings were reinstated the debtors had no interest in the real estate.

In the instant case, of course, both sale and confirmation took place in the summer of 1935 after the Radford decision and before the amendment of the statute. The only other difference is that, in the *Byerly* case, debtor proceedings were terminated by dismissal while, in the instant case, they were terminated by a voluntary bankruptcy. In both cases the effect was to terminate the property rights of the mortgagors at a time when no bankruptcy stay prevented it.

However, the importance of the *Byerly* case in the present controversy is that it squarely recognizes and applies, in a *Frazier-Lemke* case, the usual rule that if a court has jurisdiction of the parties and the subject matter its orders are not void even though they may be erroneous, and can only be attacked by appeal to a higher court, *thus definitely sustaining the argument made in subdivision III, (1) of this brief.*

(4) *Borchard vs. California Bank*, —U. S.—, 84 L. Ed. Advance Sheets 867.

This was a case where after various proceedings, a debtor was duly adjudicated a bankrupt and applied for the benefits of amended subsection (s). Before his petition for appraisal, etc. had been acted on, he entered into stipulations with the mortgagee providing a plan for the operation of the property and reserving, without

prejudice, the rights of the parties. Subsequently, the debtor renewed his application for the benefits of subsection (s) and the mortgagee petitioned for leave to foreclose. The court granted the latter application and this Court reversed it, saying that after the debtor's application for the benefits of subsection (s) the procedure outlined by that subsection should have been followed and that the parties were not at liberty to adopt a different procedure. It is obvious from this statement that the case can have no application to the one now before the court.

CONCLUSION

In conclusion, we respectfully submit that the order of the Circuit Court of Appeals for the Ninth Circuit, made March 22, 1940, was right and should be affirmed by this court because:—

(1) The term having expired and its mandate issued, the Circuit Court of Appeals had no jurisdiction to recall the mandate or reopen its decree.

(2) The subsequent decision of a higher court in a different case, between other parties, is not ground for a bill of review.

(3) The judgment sought to be reopened being final, the Circuit Court of Appeals could not have authorized a rehearing in the District Court and, even if it could, its refusal so to do would not have been appealable.

(4) The judgment of the Circuit Court of Appeals, sought to be reopened, was right because:—

(a) The orders of the District Court, affirmed by the Circuit Court of Appeals, amounted merely to refusal to rehear previous decisions as to which the time for appeal had expired and which had become res judicata;

(b) The sheriff's sales having taken place after the termination of debtor proceedings and while petitioners were in ordinary bankruptcy and before the amendment of the Frazier-Lemke Act, and the redemption period having expired before the amended act was invoked, petitioners had lost all title to the real estate before they took any proper steps to secure the benefits of the amended act.

(c) It was therefore proper for the conciliation commissioner to deny a stay order and proceed with bankruptcy administration.

Respectfully submitted,

H. G. PLATT,
GEORGE BLACK, JR. and
A. D. PLATT.

Counsel for respondent,
M. R. Johnson.

RALPH A. COAN.

Counsel for respondent,
Joseph M. Loomis, Trustee.